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NO. _____

IN THE

Supreme Court of the United States

October Term, 1980

DEPARTMENT OF AGRICULTURE OF THE STATE OF GEORGIA, et al.,
Petitioners,

v.

J. L. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. After a State enters the economic market of providing farm produce sales locations, is its policy allocating the assignment of limited tenant space on a Farmers Market built, owned, operated and maintained by the State the type of action with which the Commerce Clause is concerned.

2. Whether interstate commerce is impermissibly burdened when a State accords a very limited, seasonal preference to its resident tax-paying farmers in the allocation of tenant space used for the sale of farm produce on a State-constructed and maintained Farmers Market during crowded conditions when available space at the Market is exhausted.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *J. L. Smith v. Department of Agriculture of State of Georgia, et al.*, 630 F.2d 1081 (5th Cir. 1980). A copy is attached hereto as Appendix A. The Court of Appeals' denial of Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc (without further opinion) is reported at 636 F.2d 315 (5th Cir. 1981). The opinion of the United States District Court for the Middle District of Georgia was not reported. A copy is attached hereto as Appendix B.

JURISDICTION

Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc respecting the Court of Appeals' decision of November 19, 1980 was denied by the Court of Appeals on January 2, 1981. *See J. L. Smith v. Department of Agriculture of State of Georgia, et al.*, 636 F.2d 315 (5th Cir. 1981). This Petition for a Writ of Certiorari was filed within 90 days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

It should be noted that both the District Court and the Court of Appeals characterized the State action involved in this case as a rule or regulation. It is clear from the record, however, that the State action involved was not a statewide rule or regulation, but rather a limited policy or practice implemented by a State employee at the State Farmers Market in Columbus, Georgia. Were the State action a rule or regulation having the force and effect of law, an appeal pursuant to 28 U.S.C. § 1254(2) would be the appropriate method to invoke this Court's jurisdiction. Out of an abundance of caution, this cause is submitted by way of Petition for a Writ of Certiorari, with the request that should this Court find differently, an appropriate substitution of jurisdictional invocation occur.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, Sec. VIII, Clause III:

"The Congress shall have Power:

* * *

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States:"

Ga. Code Ann. § 5-212.1:

"In order to better manage the markets authorized by this law, and to thereby facilitate the use of the markets by the citizens of this State, on or after January 1, 1977, all persons desiring to sell or to offer for sale any items on the facilities of any market operated pursuant to this law, which charges a gate fee, must be licensed to do so by the Commissioner of Agriculture. By applying for a license or retaining said license, the applicant or licensee, as the case may be, gives his express consent for representatives of the Commissioner of Agriculture to enter upon

and inspect all property owned, leased, controlled or used in the production of crops, by said applicant or licensee."

STATEMENT OF THE CASE

This action was commenced by Respondent J. L. Smith ("Smith"), an Alabama resident who produces farm commodities in Russell and Lee Counties, Alabama, and who uses as one location for his produce sales the Georgia-owned, financed and operated State Farmers Market in Columbus, Georgia ("Columbus Farmers Market"). The primary defendant below was the Petitioner Department of Agriculture of the State of Georgia ("Department").[1] The Department is the State agency impressed with the responsibility for operating and maintaining a system of State farmers markets in Georgia which have been constructed and are owned, financed and operated by the State of Georgia.[2]

The State farmers market system, of which the Columbus Farmers Market is a part, is operated for the purpose of affording producers and sellers of farm produce a location for the sale of farm commodities. Individuals seeking to sell produce on these markets rent space and acquire a license from the Department allowing them to utilize market space and sell produce. *See* Ga. Code Ann. § 5-212.1.

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[1] Other defendants in this case, who are Petitioners before this Honorable Court, include Thomas T. Irvin, Georgia Commissioner of Agriculture, James C. Bridges, Director of Markets, and Willis Williams, Manager of the Columbus Farmers Market.

[2] The Department of Agriculture is the alter ego of the State of Georgia. The designations "Department" and "State of Georgia" are sometimes used interchangeably in this Petition, but refer to the same entity.

During certain times of the growing and selling seasons, tenant space at the Columbus Farmers Market becomes extremely crowded. During those periods of time *only*, preference in the assignment of tenant space is given to Georgia farmers growing and selling their own produce. This preference merely consists of the assignment of one or more out-of-State farmers to space in a "drive-through" produce shed, which differs slightly from the other two shed areas, which are "elevated sheds." Elevated sheds are so named because they have a raised concrete platform on which to display produce. Additionally, in comparison with the drive-through shed, the elevated sheds afford better protection for produce from the sun and rain, more customer parking area, and better accessibility for the farmers to load and unload produce. *See Smith v. Department of Agriculture of State of Georgia*, 630 F.2d 1081, 1082 (5th Cir. 1980).

Respondent Smith has sold his produce at the Columbus Farmers Market for more than 20 years. Until 1973, the assignment of space at the Market was made totally without regard to residency. By 1973, however, the demand for space at the Market had increased to such a point that available space became exhausted during the height of the growing and selling seasons. In reaction to this undisputed fact, the Department instructed the Manager of the Columbus Market to make tenant space allocations on the basis of residency *only when the Market was extremely crowded and available space under the two elevated sheds was exhausted.* At those times, when not all farmers could be accommodated in the elevated shed areas, some non-resident farmers were to be assigned to the drive-through shed. This policy was followed for five years without incident.[3]

[3] Both the District Court and the Fifth Circuit characterize the

In the summer of 1978, Smith was assigned space in one of the elevated sheds. As the growing and selling season reached its peak, the number of Georgia farmers applying for tenant space on the Columbus Farmers Market completely exhausted the space available beneath the elevated sheds and the Department, pursuant to its policy, requested that Smith move to and occupy space under the drive-through shed. (Smith had been informed at previous times during the preceding five years that such a possibility of relocation might occur if the Columbus Market became overly crowded.) Smith refused to move, and was told that such refusal subjected his license to possible suspension or revocation for failure to follow the policy of the Department.

Smith filed suit in the United States District Court for the Middle District of Georgia claiming that the limited preferential policy of the Department violated the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the United States Constitution. An evidentiary hearing followed.

The evidence clearly showed that no out-of-State farmers had ever been denied access to the Columbus Farmers Market to sell produce, and that no out-of-State farmer had ever been denied a license to sell produce on the Columbus Farmers Market because of his residence. The evidence further showed that *only* in extremely crowded conditions are out-of-State farmers asked to occupy the drive-through shed.

The rent for tenant space on the Columbus Farmers

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limited preferential policy as a "rule or regulation" of the Department. However, it is clear from the record that it is not a statewide rule or regulation of the Department, but rather a policy or practice implemented by the Manager of the Columbus Market.

Market is the same for Georgia farmers as for non-resident farmers, and the fees for licenses to sell produce at the Market are the same for Georgia farmers and non-resident farmers. Rather than charging non-resident farmers a higher license fee, or a greater rental charge for tenant space, the Department had determined it would prefer its resident farmers over others through the allocation of tenant space when, and only when, the available tenant space was completely utilized.

The Columbus Farmers Market, like all other State farmers markets in Georgia, is supported by appropriations of the State of Georgia, funded by tax revenues paid by the citizens of Georgia. In renting tenant space, the Columbus Market sells a service, rather than a good. It sells this service at a net loss which is made up through tax revenues. The evidence further showed that since there is no available system of Alabama farmers markets, or any other farmers market in close proximity to Smith, the Columbus Farmers Market offers him an available, attractive facility for the sale of his farm produce.

At the hearing, not one shred of evidence was introduced or testimony elicited showing that a non-resident farmer's produce sales would diminish in the drive-through shed.[4] Based solely upon the tenuous factual predicate of the physical description of the drive-through shed, and the single statement of the Columbus Market Manager that he thought it to be a less desirable sales location than the elevated sheds, the District Court found that the Department's policy impermissibly burdened interstate commerce between Alabama and Georgia. Simi-

[4] Smith, in fact, never moved to nor utilized the drive-through shed for the sale of his produce. He offered, by way of *speculation* only, that he thought his sales would suffer.

larly based on these same scant facts, the District Court found that the policy provided an arbitrary classification sufficient to run afoul of the guarantees of the Equal Protection Clause. The Department filed a timely appeal of the District Court Order to the Fifth Circuit Court of Appeals.

The primary thrust of the appeal to the Fifth Circuit was that the policy at the Columbus Farmers Market does not involve action with which the Commerce Clause is concerned. The Department by entering the economic market for marketplace space and produce sales locations is performing a governmental proprietary function which should not be subjected to scrutiny under the Commerce Clause. The Department is a participant in the economic market for marketplace space. It is not a regulator of that economic market, nor is it a participant in or regulator of the economic market of farm produce sales.[5]

The Department further argued to the Fifth Circuit that even assuming some ever-so-slight effect on interstate commerce had been shown, it was more than offset by the legitimate State objective of allocating a finite State-owned, financed and operated facility on the fairest possible basis, in view of the State's responsibility to its Georgia taxpayers who supplied the revenue to build, maintain and operate the facility.

The Fifth Circuit Court of Appeals issued its opinion on November 19, 1980 affirming the Order of the District Court and holding that the Department's policy violates

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[5] The Department does not regulate the allocation of space at all farmers markets in Georgia, only at the ones it builds and operates. Similarly, the Department does not participate in or regulate the sale of farm produce generally throughout Georgia in any sense relevant to the issues in this case.

the Commerce Clause of the United States Constitution. In view of that holding, the Fifth Circuit found it unnecessary to address the Equal Protection issues. *See Smith v. Department of Agriculture of State of Georgia*, 630 F.2d 1081 (5th Cir. 1980). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and was denied on January 2, 1981. *See Smith v. Department of Agriculture of State of Georgia*, 636 F.2d 315 (5th Cir. 1981). The Department now petitions this Honorable Court for a Writ of Certiorari to review the decision of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Fifth Circuit Court of Appeals prohibits the State of Georgia, after entering the economic market of the construction of farm produce sales locations, from preferring its resident, tax-paying farmers (in a very limited manner) over non-residents in the allocation of tenant space on a State-constructed, maintained and operated farmers market. This decision squarely conflicts with the Supreme Court's decisions in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, ____ U.S. ____, 100 S.Ct. 2271 (1980).

The majority opinion of the Fifth Circuit misses the pivotal issue in this case and, in so doing, results in a decision in direct conflict with clear precedents of the Supreme Court. The majority holds that the assignment of tenant space by the Department at the Columbus Farmers Market, according a limited, seasonal preference to Georgia farmers, imposes an impermissible burden upon interstate commerce in contravention of the Commerce Clause of the United States Constitution.[6]

[6] The majority opinion was written by Judge Lynne, District Judge

After acknowledging that the State of Georgia has simply provided a suitable marketplace for the buying and selling of farm produce, the Court of Appeals goes on to hold expansively that Georgia's essential role is that of a market regulator. Hence, it holds, Georgia is not acting in a proprietary capacity, and its space allocation policy is therefore subject to scrutiny under the Commerce Clause. *Smith v. Department of Agriculture of State of Georgia, supra,* at p. 1083. This decision simply does not comport with the common-sense approach and reasoned holdings of this Honorable Court in *Hughes v. Alexandria Scrap,* 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake,* ___ U.S. ___, 100 S.Ct. 2271 (1980).

In *Alexandria Scrap,* this Court approved a Maryland program which paid a bounty for every Maryland-titled junk car converted into scrap, despite the fact that Maryland law imposed more burdensome documentation standards on out-of-state than on in-state processors. Although the practical effect of Maryland law was substantially the same as if it had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed out-of-state processors, this Court held that such did not involve the kind of action with which the Commerce Clause is concerned. *Hughes v. Alexandria Scrap, supra,* at p. 805.

In *Reeves, Inc. v. Stake, supra,* this Court held that South Dakota, in a time of shortage, could confine the sale of cement produced at a state-owned plant solely to its residents. The decision in *Reeves* followed the lead of *Alexandria Scrap* in holding that such action by a state

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of the Northern District of Alabama, sitting by designation. Circuit Judge Gee filed a specially concurring opinion, and Circuit Judge Randall filed a dissenting opinion.

was not the kind of action to which the Commerce Clause is addressed. The *Reeves* Court stated that the basic distinction drawn in *Alexandria Scrap* between states as market participants and states as market regulators makes good sense and sound law. *Reeves, supra,* 100 S.Ct. at p. 2277 (1980). South Dakota's entry into the cement market is indistinguishable in principle from Georgia's entry into the produce sales location market in the case at bar.

The essence of this case involves the propriety of the State of Georgia's involvement in the economic market of sales booths and produce sales locations; not the economic market of tomatoes and potatoes. As pointed out by the dissent in the Fifth Circuit opinion, Georgia has neither attempted to regulate the sale of farm produce generally in Georgia, nor has it sought to regulate farmers markets other than those it owns. Rather,

> ". . . whatever 'regulation' is involved in this case relates only to something that is as concrete as an economic market is abstract—a piece of real estate, owned and operated largely at the expense of the State's tax revenues, which, for a fee, offers private buyers and sellers of farm produce a physical marketplace of a particular type and quality." *Smith v. Department of Agriculture of State of Georgia, supra,* at p. 1087.

The majority Fifth Circuit opinion, then, fundamentally misconstrues the market into which the State of Georgia has entered. It concludes that because Georgia offers a commercial service rather than actually participating in buying or selling produce, it acts primarily as a "regulator" rather than a "participant" in the produce market. However, as cogently pointed out by the dissent, if by that the majority means that Georgia is regulating that portion of the interstate produce market occurring within

its boundaries, the facts in this case simply do not support such an assertion. On the other hand, if the majority means instead only that Georgia's essential role is that of a regulator of the physical marketplace space, then this case is squarely within the rationale of *Alexandria Scrap* and *Reeves*. *See Smith v. Department of Agriculture of State of Georgia, supra,* at p. 1088.

The common thread of the interstate commerce cases distinguished in *Alexandria Scrap* is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, in the case at bar, Georgia has not sought to prohibit the flow of farm produce or regulate the conditions under which it can occur. Instead, Georgia has entered the market for marketplace space by building a State system of farmers markets which, in turn, legitimately foster and encourage produce sales and the interstate transportation of produce for sale. Consequently, this case falls squarely within the rationale of those cases distinguished in *Alexandria Scrap*, and the Fifth Circuit's holding therefore squarely conflicts with *Alexandria Scrap*.

In similar fashion, the Fifth Circuit's decision conflicts directly with this Court's holding in *Reeves, Inc. v. Stake, supra*. If South Dakota, in a time of shortage, can confine the sale of its State-produced cement to its residents, it follows and only makes good sense that Georgia's tenant-allocation policy during a time of extreme shortage of marketplace space is a similarly permissible State proprietary action. Certainly, with respect to the question of whether such activity falls within the kind of action with which the Commerce Clause is concerned, Georgia's policy is infinitely less onerous than South Dakota's total denial of cement to out-of-state buyers.

The policy in question shows on its face that it pertains only to tenant space allocation, and not the regulation of produce sales. It is operative *only* during extremely crowded Market conditions. During non-crowded times the policy does not come into play. If the Columbus Farmers Market, therefore, is not crowded, the policy is not applicable and whatever space is being used at the Market can theoretically be completely filled by non-resident farmers. The trust of the policy, then, is obviously that of space assignment.

This Court has affirmed the notion that judicial restraint in the area of state proprietary functions should be dictated by considerations of state sovereignty and the states' roles as guardians and trustees for its people. *See American Yearbook Co. v. Askew*, 339 F.Supp. 719 (M.D. Fla. 1972), *aff'd* 409 U.S. 904 (1972). In exercising its *proprietary* function of providing marketplace space for Georgia farmers and growers, the State of Georgia has entered and is participating in the economic market for physical marketplace space. As stated by this Court in *Alexandria Scrap:*

> "Nothing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." 426 U.S. at 810.

It is respectfully submitted that the policy of the Department in the case at bar is not properly subject to scrutiny under the Commerce Clause.

II.

Assuming (but not conceding) that the Department's policy is subject to scrutiny under the Commerce Clause, the Fifth Circuit's decision invalidating it does not follow, and directly conflicts with, the Supreme Court's rationale and logic in numerous interstate commerce cases, among which most notably are *Hughes v. Oklahoma,* 441 U.S. 322 (1979) and *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).

Scrutiny under the Commerce Clause traditionally follows a three-question analysis, as outlined by this Court in *Hughes v. Oklahoma*, 441 U.S. 322 (1979):

(1) Whether the challenged statute (regulation or policy) regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) Whether the statute (regulation or policy) serves a legitimate local purpose; and, if so,

(3) Whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

With respect to the first question, the Department's policy demonstrates substantial evenhandedness.[7] Although the effect of the policy might be considered "direct" instead of "indirect," it cannot be gainsaid that it is "incidental" when it arises only as a by-product of the policy's purpose to promote the fairest and most efficient use of a State-financed, tax-supported facility. The assignment of some non-resident farmers to the drive-through shed area of the Columbus Market results only as an

[7] Georgia has not issued a complete prohibition of non-resident sellers at its State-owned marketplaces. Although Georgia requires a license of both resident and non-resident sellers, it does not charge a fee for this license to either. There is no distinction made among sellers based on produce quality; and the Market entry fee required of all producers is based on the size of the seller's truck, without regard to residence. *See Smith v. Department of Agriculture of State of Georgia, supra,* at p. 1087, fn. 2.

incident of the limited space assignment preference given those who have substantially borne the financial burden of the construction and maintenance of the Market.

In any event, a determination that the policy has more than an "incidental" effect on interstate commerce leads only to a consideration of the second question—whether the policy serves a legitimate local purpose. At this juncture, one point cannot be overstressed. The policy of the Department implemented and operative only during extremely busy Market conditions is solely an attempt to allocate a finite space on a State-financed facility in the most reasonable and fair manner possible, given Georgia's responsibility to its own citizens. Such an allocation of limited space on a State facility clearly serves a legitimate local purpose.

The traditional test by which burdens on interstate commerce are commonly measured is, in general, that if the burden promotes a legitimate state interest, and its effect on interstate commerce is slight, the burden will be upheld unless it is clearly excessive in relation to the putative local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This test recognizes the traditional acceptance by this Court of incidental burdens upon interstate commerce where the impairment only negligibly impedes the flow of commerce. *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1937). Without doubt, it is clear that regardless of the manner in which the incidental burden exception articulated in *Pike* is expressed, it seems apparent that State action should not be struck down on the mere showing that it affects interstate commerce in some small way; it must be excessive. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963).

Applied to this case, the *Pike* formula legitimates the Department's policy. Any slight "burden" placed upon interstate commerce as a by-product of the Department's attempt to fairly allocate tenant space fosters a legitimate State interest, and should only be examined for the purpose of balancing the degree of burden upon interstate commerce in relation to the putative local interest served. If the burden on commerce is clearly excessive, the barrier is constitutionally defective. Here, the burden is neither excessive nor constitutionally impermissible.

With respect to the third question in the analysis, certainly it would seem that the infrequent, short-term assignment of non-resident farmers to the drive-through shed is more economically palatable to them than an accelerated license fee schedule as could be charged to non-residents under the rationale of *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978),[8] or a higher rental charge arrangement as would be suggested by *Rosenstock v. Board of Governors of the University of North Carolina*, 423 F.Supp. 1321 (M.D. N.C. 1976). *See, also, Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969); *American Commuters Ass'n v. Levitt*, 405 F.2d 1148 (2nd Cir. 1969).

The mere fact that Smith was asked to move to the drive-through shed at the Columbus Market is not and should not be viewed as a burden to the movement of his farm produce (or the farm produce of any other non-resident farmer) into the State of Georgia. Smith, as well as any other non-resident, has free rein and right to move about in the State of Georgia to transact the sale of his goods anywhere he wishes. There is no burden generally

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[8] *See, also, Toye Brothers Yellow Cab Co. v. Irby*, 437 F.2d 806 (5th Cir. 1971).

placed on his sale of farm produce in Georgia. He is free to come and go, sell and transact business, as he sees fit. The Department's policy says only that if he uses the State-financed and maintained Columbus Market as his sales location, then during *brief periods of inordinate demand* for tenant space, the State of Georgia will prefer its own residents (who supplied the tax funds to construct and operate the Market) over those who have not paid taxes for its construction and maintenance. The Fifth Circuit's decision, in effect, robs Georgia of the intended benefit of its foresight, industry and enterprise in providing marketplaces for the sale of produce. *See, e.g., Reeves, Inc. v. Stake, supra.*

Building the Columbus Farmers Market on the western border of Georgia has certainly given Alabama farmers an attractive facility at which to sell their produce, and, as is evidenced in the case at bar, has actually encouraged the interstate transport and commerce of farm produce. To view this case as showing an impermissible burden on interstate commerce is as illogical as finding that Georgia's construction of its farmers market system caused a barrier to interstate commerce in the first instance. For example, without Georgia's system of farmers markets, there would very likely be (applying only the same degree of speculation as was used here by Smith to show a burden on commerce) more Georgia produce transported into Florida (instead of sold at the State market on Georgia's southern border at Thomasville), or into South Carolina (instead of sold at the State markets on the eastern border at Augusta and Savannah), or, for that matter, into Alabama (instead of sold at the Columbus Market).

It is respectfully submitted that, even if the Department's policy is subjected to scrutiny under the Commerce Clause, it operates evenhandedly, serves a legitimate local purpose, does not produce a burden in excess of the putative local benefits, and should be affirmed as a reasonable measure.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be granted and the decision below reversed by this Honorable Court.

Respectfully submitted,

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Appendices

APPENDIX A

J. L. SMITH, Plaintiff-Appellee,

v.

The DEPARTMENT OF AGRICULTURE OF the STATE OF GEORGIA et al.,

Defendants-Appellants.

No. 78-3310.

United States Court of Appeals, Fifth Circuit.

Nov. 19, 1980.

Department of Agriculture of the State of Georgia appealed from a judgment of the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., holding unconstitutional a Department rule or regulation whereby nonresidents of Georgia were assigned to inferior sales locations at the Georgia state farmers market in Columbus, Georgia, during periods of crowded conditions. The Court of Appeals, Lynne, J., sitting by designation, held that the rule violated the commerce clause.

Affirmed.

Gee, Circuit Judge, filed a specially concurring opinion.
Randall, Circuit Judge, filed a dissenting opinion.

1. Commerce 62.5

Operation of Columbus Farmers Market by Department of Agriculture of State of Georgia was subject to scrutiny under commerce clause, since Department neither produced goods to be sold at market, nor engaged in actual buying or selling of those goods, but instead simply provided suitable marketplace for buying and selling of privately owned goods. U.S.C.A.Const. Art. 1, § 8, cl. 3.

2. Commerce 62.5

Rule or regulation of Department of Agriculture of the State of Georgia, whereby nonresidents of Georgia were assigned to inferior sales locations at Georgia state farmers market in Columbus, Georgia, during periods of crowded conditions violated commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Appeal from the United States District Court for the Middle District of Georgia.

Before GEE and RANDALL, Circuit Judges, and LYNNE,* District Judge.

LYNNE, District Judge:

This appeal involves a challenge to the constitutionality of a rule or regulation of the Department of Agriculture of the State of Georgia, whereby non-residents of Georgia are assigned to inferior sales locations at the Georgia State Farmers Market in Columbus, Georgia ("Columbus Farmers Market"), during periods of crowded conditions. The District Court found that the rule violated both the Equal Protection Clause and the Commerce Clause of the United States Constitution. We affirm solely on the ground that the rule violates the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.

I.

The Columbus Farmers Market is owned and partially financed [1] by the State of Georgia, and operated by the State Department of Agriculture. Individuals who wish to sell their produce at such market must acquire a license from the Georgia Department of Agriculture and

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* District Judge of the Northern District of Alabama, sitting by designation.

[1] In the fiscal years 1975-76, 1976-77 and 1977-78, the percentage of the Columbus Farmers Market's operating expenses which were funded by the State of Georgia ranged from approximately 39.4% to 45.4%. *See* Record at 56-58.

rent space therein. The market consists of three separate selling areas from which individual growers sell their produce to the general public. Two of the selling locations are "elevated shed" areas, and the third has been designated the "drive-through" shed. Based upon substantial evidence in the record, the trial court found that the elevated sheds are much more desirable locations from which to sell. In comparison with the drive-through shed, the elevated shed areas afford better protection for produce from the sun and rain, and superior produce display location, more readily available customer parking, and better accessibility for the farmers to load and unload their produce. Findings of Fact ¶ 4, App. 47.

Plaintiff-appellee J. L. Smith is a resident of Phenix City, Alabama, and is engaged in farming operations in Russell and Lee Counties, Alabama. Smith has sold his produce at the Columbus Farmers Market over a period of approximately twenty years. Until 1973, he was assigned space at the market without regard to the fact that he is a non-resident of the State of Georgia.

In 1973, however, the Georgia Department of Agriculture instructed its Columbus Market manager that space assignments at the market were to be made on the basis of state residence, with preference to residents of the State of Georgia. Accordingly, at times when all farmers could not be accommodated in the elevated shed area, non-resident farmers were to be relegated to the drive-through shed. The sole basis for the assignment of Alabama farmers to the less desirable shed is the fact that they are non-residents of the State of Georgia. Findings of Fact ¶ 5, App. 47. Most significantly, the admitted purpose of the rule was to give a preference to Georgia

residents over non-residents of Georgia, thereby providing a competitive advantage to Georgia farmers.[2]

During the selling season of 1978, Smith was told to move his produce sales from an elevated shed to the drive-through shed. When he refused, he was told that his license was subject to suspension or revocation for failure to move.

Smith filed suit on July 5, 1978, seeking injunctive and declaratory relief and claiming that the regulation giving preference to Georgia residents violated the Commerce Clause, the Equal Protection Clause and the Privilege and Immunities Clause. After an evidentiary hearing, the district court entered a judgment declaring the rule violative of both the Commerce Clause and the Equal Protection Clause and permanently enjoining the enforcement of the regulation. Because we hold that the regulation violates the Commerce Clause, it is unnecessary to adress the merits of the other grounds advanced by appellees.

II.

The threshold issue involved in this appeal is whether the regulation of the Georgia Department of Agriculture is subject to scrutiny under the Commerce Clause at all. Two recent decisions of the United States Supreme Court indicate that the resolution of this issue depends upon whether the defendants were acting in a proprietary capacity on the one hand or in a regulatory capacity on

[2] "Witnesses for the Defendants testified that the purpose for the method of assignment was to give preference to Georgia residents over residents of other states." Findings of Fact ¶6, App., 47. Moreover, appellants have virtually conceded the underlying purpose of the rule by arguing that "the burden placed upon interstate commerce *to promote an in-state industry* . . . fosters a legitimate state interest . . ." Brief for Appellants 19 (emphasis supplied).

the other. *See Reeves v. Stake*, ____ U.S. ____, 100 S.Ct. 2271, 65 L.Ed.2d ____ (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976).

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[1] In *Alexandria Scrap*, the Supreme Court rejected a Virginia scrap processor's challenge to a Maryland program to pay a bounty for every Maryland-titled junk car converted into scrap, despite a 1974 amendment to the legislation which imposed more onerous documentation standards on out-of-state than in-state processors. The Court held that *Alexandria Scrap* did not involve "the kind of action with which the Commerce Clause is concerned," 426 U.S., at 805, 96 S.Ct., at 2495, and explained that, "Maryland had not sought to prohibit the flow of hulks, or to regulate the condition under which it may occur. Instead, it has entered into the market itself to bid up their price." *Id.*, at 806, 96 S.Ct., at 2496. The Court concluded that: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810, 96 S.Ct., at 2498 (footnotes omitted).

In *Reeves v. Stake*, *supra*, ____ U.S. ____, 100 S.Ct. 2271, 65 L.Ed.2d ____, the Supreme Court reiterated its belief that, "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." ____ U.S., at ____, 100 S.Ct., at 2277. The Court then held that the State of South Dakota, in a time of shortage, may confine the sale of the cement which it produces at a state-owned plant, solely to residents of South Dakota. The basis of the Court's decision in *Reeves* was

again that the State was acting as a market participant rather than as a market regulator.

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Georgia's role at the Columbus Farmers Market can only be described as a hybrid one. Admittedly, the market is owned, operated and partially financed by the State of Georgia. On the other hand, it is significant that appellants neither produce the goods to be sold at the market, nor engage in the actual buying or selling of those goods. In essence, the State of Georgia has simply provided a suitable marketplace for the buying and selling of privately owned goods. It is this type of activity which was distinguished by the Court in *Alexandria Scarp*, 426 U.S., at 805-806, 96 S.Ct., at 2495-96, and *Reeves*, ____ U.S., at ____ n. 4, 100 S.Ct., at 2275 n. 4. Accordingly, the State of Georgia cannot be deemed an actual market participant at the Columbus Farmers Market. Rather, its essential role is that of market regulator. As such, appellants' rules and regulations governing the operation of the Columbus Farmers Market are subject to scrutiny under the Commerce Clause.

III.

[2] Having decided that this case involves the kind of activity to which the Commerce Clause applies, it is necessary to determine whether the regulation at issue imposes an impermissible burden on interstate commerce. The purpose underlying the Commerce Clause has been most appropriately stated by Justice Jackson in *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be en-

> couraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id., at 539, 69 S.Ct., at 665.

Traditional Commerce Clause analysis follows the three-pronged inquiry outlined by the Court in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979):

> Under that general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Id., at 336, 99 S.Ct., at 1736. *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct., 844, 25 L.Ed.2d 174 (1970). Under the first step of the *Hughes* test, it is undeniable that the regulation at issue discriminates against interstate commerce on its face by giving Georgia farmers a preference over out-of-state farmers solely on the basis of their residence. Accordingly, the burden falls on appellants to justify the regulation both in terms of the local benefits flowing from it and the unavailability of nondiscriminatory alternatives that would adequately preserve those local interests. *Hughes v. Oklahoma*, 441 U.S., at 336, 99 S.Ct. at 1736; *Hunt v. Washington Apple Ad-*

vertising Commission, 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977); *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 73 (5th Cir. 1980).

Under the circumstances of the case *sub judice*, appellants' burden is virtually insurmountable. The avowed purpose of the regulation is to give a preference to Georgia farmers over nonresident farmers, thereby promoting an in-state industry.[3] It is precisely this type of parochial legislation which has been subject to the closest scrutiny by the courts:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. *See, e. g., Hood & Sons v. Du Mond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406, [68 S.Ct. 1156, 1165-1167, 92 L.Ed. 1460]; *Baldwin v. G. A. F. Seelig*, [294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032], *supra; Buck v. Kuykendall*, 267 U.S. 307, 315-316, [45 S.Ct. 324, 325-326, 69 L.Ed. 623]. . . .
>
> The crucial inquiry, therefore, must be directed to determining whether ch. 363 [the law at issue] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns,

[3] *See* footnote 2, *supra*. It might be argued that the actual purpose of the regulation was simply to deal with the lack of space available at the Columbus Farmers Market. However, "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626, 98 S.Ct. 2531, 2537, 57 L.Ed.2d 475 (1978). In *City of Philadelphia*, the Court explained: "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." *Id.*, at 626-27, 98 S.Ct., at 2537.

> with effects upon interstate commerce that are only incidental.

City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24, 98 S.Ct. 2531, 2535-2536, 57 L.Ed.2d 475 (1978). More recently, in *Lewis v. BT Investment Managers, Inc.*, ____ U.S. ____, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980), the Court was faced with a challenge to a Florida statute which prohibited an out-of-state bank holding company from owning or controlling a business within Florida that sells investment advisory services. In finding the statute unconstitutional, the Court again recognized "the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.*, at ____, 100 S.Ct., at 2019.[4]

The clear teaching of *City of Philadelphia* and *Lewis* is that economic protectionism is not the kind of legitimate local purpose that would justify a discriminatory burden on interstate commerce. In light of the admitted purpose of the regulation at issue to promote in-state business by giving preferential space assignments to Georgia farmers, the conclusion is inescapable that it is basically a protectionist measure. Appellants have failed to provide any convincing justification for the preference given to Georgia growers. Indeed, there is obviously no reason to

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[4] *See also, Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir. 1980) (holding a Louisiana workers' registration ordinance violative of the Commerce Clause):

> The type of discrimination that has been the focus of the Supreme Court's analysis occurs when a state or local law distinguishes between commerce originating within a state and commerce originating outside the state. Most often this discrimination takes the form of economic protectionism, and the Court has consistently held this type of parochial legislation constitutionally invalid. *See, e. g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) . . .

differentiate between Georgia and non-resident growers on any basis other than their residence. Accordingly, this case appears to fall squarely within the "virtually *per se*" language of *City of Philadelphia*, 437 U.S., at 624, 98 S.Ct., at 2536.[5]

For the foregoing reasons, we conclude that the district court correctly found that the regulation at issue violates the Commerce Clause, and properly enjoined the continued enforcement thereof.

AFFIRMED.

GEE, Circuit Judge, specially concurring:

The admirable opinions by my colleagues in this close case put each of the opposing positions better than could I. Reading either alone, my impulse is to concur. Since this is so, I write briefly to set out the somewhat primitive course of reasoning that moves me to join in holding the preference here accorded Georgia producers invalid.

I part company with the dissenting view early, with a statement in its third sentence: "the State [has not] prohibited or limited the flow of trade across its borders." Granted that this were so, I could not disagree with much of what follows in Judge Randall's dissent.[6] But I think the flow is interfered with here, and in an impermissible way, though the question is a very close one.

It is certainly true that the State of Georgia has not

[5] Having concluded that the regulation does not serve a legitimate local purpose, it is unnecessary to balance the burden of the regulation on interstate commerce against its putative local benefits. "*If* a legitimate local purpose is found, *then* the question becomes one of degree." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (emphasis supplied).

[6] I do not imply that merely because it does inhibit that flow it is necessarily invalid, only that the circumstance that it does requires further inquiry.

acted directly to forbid entry of Alabama produce. It has done no more than disadvantage foreign producers somewhat in their competition with domestic ones for the Georgia produce market by relegating them to the end of the line in sale—booth assignments—and this, moreover, in a facility that, but for Georgia taxpayers, would not exist. At first blush, this may seem a slight burden, but implicit in the findings of the court below is that it is not slight but significant.[7]

Since this is so and the burden is not de minimis, I am unable to see how the case differs in principle from one in which foreign producers were denied use of the facility entirely.

This being so, and the case being therefore properly seen as one in which *some* market is being interfered with severely—to the advantage of domestic producers and the detriment of foreign ones—the inquiry comes down to answering the question: a market in *what*?

If the market is properly to be viewed as one in sale booths for produce, then Georgia occupies a proprietary capacity as the producer of the booths. And if it does so, then under the *Reeves* and *Alexandria Scrap* decisions of of the Supreme Court, Georgia may as a proprietor deal in its booths pretty much as it likes.[8] But if the relevant

[7] The judge found as a fact that the drive-through shed to which plaintiff Smith was relegated by the Georgia preference "is a less desirable location from which to sell produce than the elevated sheds" and concluded that Smith would be irreparably damaged unless the injunction issued.

[8] In *Reeves, Inc. v. Stake*, ____ U.S. ____, 100 S.Ct. 2271, 65 L.Ed.2d ____ (1980), the state produced the basic commodity, cement. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), the state had enhanced—and therefore partly created—a local market in automobile hulks by paying a bounty on them.

market be seen as one in vegetables, then Georgia is not their producer or seller and hence does not occupy a proprietary position as to them. Instead, it is one who has focussed and localized an existing market by constructing the physical selling facility in which it is carried on. As such, its activities seem to me more analagous to those of a regulator than to those of a proprietor.

I conclude that this case is one about produce, not about sale booths. The case seems to me, therefore, undistinguishable in principle from one in which the state denies to out-of-state producers the use of principal state highways, relegating them to back roads, or confines the use of a state-built coliseum or theatre to that by entertainers residing in Georgia. The state need not act to aid existing markets by the construction of physical facilities, but where it does, it seems to me that the concept of a common market created by the Commerce Clause requires that foreign and domestic marketeers be treated indifferently. I therefore join in the majority opinion.

RANDALL, Circuit Judge, dissenting:

Because I believe that the Supreme Court's decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), and *Reeves, Inc. v. Stake*, ____ U.S. ____, 100 S.Ct. 2271, 65 L.Ed.2d ____ (1980), dictate a result contrary to that reached by the majority opinion in this case, I respectfully dissent.

As the district court below pointed out at the close of the evidentiary hearing on the merits of this case, "we need to keep in mind what we are talking about."[9] Unlike

[9] The district court's remarks at the close of the hearing bear repeating:

> Well, as I previously noted, what we have involved here is not any effort on the part of one State to prevent citizens of

the more typical Commerce Clause case, this case does not involve a State's regulation of an entire private industry; nor has the State prohibited or limited the flow of trade across its borders. We must keep in mind that we are not dealing with regulation of a "market" in the abstract economic sense: Georgia has not sought to regulate the interstate market for the sale of produce generally. Rather, whatever "regulation" is involved in this case relates only to something that is as concrete as an economic market is abstract—a piece of real estate, owned and operated largely at the expense of the State's tax revenues, which, for a fee, offers private buyers and sellers of farm produce a physical marketplace of a particular type and quality. The challenged regulations do not even regulate the allocation of space at phyiscal marketplaces generally, but instead reach only those owned and operated by the State.[10]

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another State from coming into the State. No effort to prevent citizens of another State from doing business in the State. We have not got anything like that. As I said it has been made to appear from some sources that that is what it's all about but that is obviously not what it's all about. . . . We are just dealing with the way a State decides to regulate the use of the tax supported Farmers Market. That's all we are doing.

Of course, it's got to where everything these days rises to constitutional proportions. Doesn't make any difference whether its potatoes or tomatoes, everything no rises to constitutional proportions. But, all I'm saying is, we need to keep in mind what we are talking about.

Transcript at 95.

I will hereinafter use the word "market" to refer only to the sort of abstract construct used by economists to describe the operation of the forces of supply and demand on the aggregate sales of a good or service (*e. g.*, the interstate market comprising sales of all farm produce; or, the market for commercial rental space in Georgia). I will use the word "marketplace" to describe the physical property where individual sales of goods take place (*e. g.*, the Columbus State Farmers Market).

[10] Even these regulations, limited as they are in scope, demonstrate significant evenhandedness: The State has not issued a complete prohibition of out-of-state sellers at its State-owned marketplaces;

Rather, the regulations challenged in this lawsuit amount to no more than selective dealing by the State in its commercial leasing of the choicest spaces at the marketplace owned and operated by the State. For years, when this service was not in such great demand, there was no need to enforce any regulation in allocating the choicest spaces other than a "first-come, first served" rule. But now, because of changes in the economic market for produce, there are not enough choice spaces in this particular physical marketplace to go around. In other words, the demand for this type of marketplace space at these prices has surpassed the supply, as happened in the cement industry in *Reeves*, ____ U.S. at ____, 100 S.Ct. at 2275. Indeed, even when Georgia residents are preferred to producers from other states, there are not enough choice spaces to satisfy the Georgia producers.

The majority opinion considers only briefly the threshold—and in my view, dispositive—question of whether this is "the kind of action [by a state] with which the Commerce Clause is concerned." *Hughes v. Alexandria Scrap Corp.*, *supra*, 426 U.S. at 805, 96 S.Ct. at 2495. The majority opinion describes the State's role in the operation of the Columbus Farmers Market as "hybrid," noting first that the marketplace is owned and operated at a net loss by the State. But the majority concludes that because the State offers a commercial service rather than actually participating in the buying and selling of goods, the State is acting primarily as a "regulator" rather than

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though the State requires a license of both in-state and out-of-state sellers, in neither instance does it charge a fee for the license; the State makes no distinctions among any sellers based on the quality of their produce; and the entry fee it requires of all producers is keyed to the size of each seller's truck, without regard to whether the seller is from Georgia or elsewhere.

a "participant" in the produce market (in the broad, economic sense of that word).

I cannot find this distinction in the Supreme Court precedents cited by the majority opinion. The type of activity that was distinguished by the Supreme Court in *Alexandria Scrap*, 426 U.S. at 805-06, 96 S.Ct. at 2495-96, and in *Reeves*, ____ U.S. ____, 100 S.Ct. at 2275 n. 4, involved states' attempts to prevent privately owned articles of trade from being shipped and sold in interstate commerce—the traditional types of Commerce Clause cases. As the Supreme Court itself noted in describing the cases they were distinguishing in *Alexandria Scarp*, "[t]he common thread in these cases is that the State interfered with the natural functioning of the *interstate market* either through prohibition or through burdensome regulation." 426 U.S. at 806, 96 S.Ct. at 2496 (emphasis added). I think that the majority has failed to demonstrate how the case at bar fits within the line of cases distinguished in *Alexandria Scrap* and *Reeves*, rather than being controlled by *Alexandria Scrap* and *Reeves* themselves.

The majority states that the State's "essential role is that of market regulator." *Supra* slip op. at 1368, at ____. If by that the majority means that the State is regulating that portion of the interstate produce market (in the abstract, economic sense of that word) that goes on within Georgia's boundaries, I think that the facts do not support that assertion. If the majority means instead only that the State's essential role is that of regulator of this physical marketplace, I fail to see how that takes this case out of the rationale of *Alexandria Scrap* and *Reeves*.[11] In

[11] Surely the State of South Dakota had regulations governing the operations of its state-owned cement plant, and the incidental effect of those regulations upon interstate commerce was much more drastic than in this case, since the South Dakota regulations effectively

this case, the State of Georgia has entered into the economic market for the provision of physical marketplaces. It no more seeks to regulate the market for marketplace space than it does the market for farm produce; rather, it is a participant in the market for marketplace space. It is selling a service rather than a good. It does so at a net loss, and that loss is made up through tax revenues. For this reason, as part of its proprietary role in regulating its own operations, the State has chosen to allocate selectively its commercial service, awarding the choicest spaces to its citizens, who indirectly bear the deficits in the operation of the marketplace through their tax dollars. This should end Commerce Clause analysis of the State's actions: " 'Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.' " *Reeves, supra,* ____ U.S. at ____, 100 S.Ct. at 2277 (quoting *Alexandria Scrap,* 426 U.S. at 810, 96 S.Ct. at 2498). Following *Reeves* and *Alexandria Scrap,* I would hold that the challenged regulation does not offend the Commerce Clause.

Because I would overturn the district court's Commerce Clause holding, I must continue to a brief analysis of the district court's alternate ground for granting relief, the Equal Protection Clause. My conclusion regarding the Commerce Clause, however, largely dictates the outcome of the equal protection analysis. The guarantee of equal protection under the United States Constitution is not a source of substantive rights or liberties, but is rather a right to be free from invidious discrimination in statutory

stopped goods from even crossing state borders. Yet according to *Reeves,* that did not mean that South Dakota was regulating interstate commerce, or the market for concrete. Rather, South Dakota was acting primarily as a market participant—a seller of goods.

classifications and other governmental activity. Where the statutory classification complained of does not impinge on a right or liberty protected by the Constitution, the validity of the classification must be sustained unless the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective. *See, e. g., Harris v. McRae,* ___ U.S. ___, ___, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980); *McGowan v. Maryland,* 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961). Since I would hold that the Commerce Clause is not violated by the challenged regulations in this case, the only question is whether the regulation bears a rational relationship to a legitimate state goal. As the Supreme Court said in rejecting the equal protection claim of the plaintiff in *Alexandria Scrap,*

> [i]t is well established, however, that a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. That [the State] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.

426 U.S. at 813, 96 S.Ct. at 2499 (citations omitted). The preference for Georgia producers bears a rational relationship to the legitimate State goal of tailoring its state-subsidized participation in the market for marketplace space most directly to benefit state taxpayers. That is all the Equal Protection Clause requires in this situation. *See id.* at 814, 96 S.Ct. at 2500. I would therefore hold that the challenged regulation does not deny Smith equal protection.

For the foregoing reasons, I would reverse both hold-

ings of the district court below. With apologies to the district judge for stealing his prose while urging that he be reversed, these potatoes and tomatoes do not rise to constitutional proportions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

[Filed at 11:55 A.M., Sept. 8, 1978, /s/ H. Okay Parker, Deputy Clerk, U.S. District Court, Middle District of Georgia]

J. L. SMITH, *Plaintiff,* VS. THE DEPARTMENT OF AGRICULTURE OF THE STATE OF GEORGIA, et al., *Defendants.*	CIVIL ACTION NO. 78-98-COL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the matter above identified, the Plaintiff seeks a declaratory judgment, declaring invalid a regulation of the Department of Agriculture of the State of Georgia, whereby residents of the State of Georgia are given preferential space assignment at the State Farmers Market operated by the Department of Agriculture in Columbus, Georgia, and a permanent injunction against the enforcement of such regulation. After evidentiary hearing in said matter, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Plaintiff, J. L. Smith, is a resident of Phenix City, Alabama, and has been an Alabama resident for the past fifteen years. Plaintiff has been engaged in farming operations in Alabama since approximately 1959, and currently grows his vegetables and other farm products in Russell County, Alabama, and Lee County, Alabama.

2. Plaintiff has engaged in the sale of his produce at the Georgia State Farmers Market in Columbus, Georgia, off and on for approximately twenty years. Until recently he has been assigned space at the Columbus Farmers Market without regard to the fact that he is non-resident of the State of Georgia.

3. In 1973, the Department of Agriculture of the State of Georgia instructed its Columbus Market Manager that space assignments at the State Farmers Market were to be made on the basis of state residence. That is, Georgia residents were to be preferred in the assignment of spaces and any remaining spaces could be assigned to non-residents of the State of Georgia.

4. The Georgia State Farmers Market in Columbus, Georgia, has three separate areas available for retail sales of produce by growers. Two of the areas are "elevated shed" areas, and the third area is a "drive through" shed. The elevated sheds provide better protection for produce from sun and rain, provide a more desirable produce display area, which is elevated several feet above ground level, have more readily available customer parking areas, and are more readily accessible to farmers in loading and unloading produce. The drive through shed provides less protection from sun and rain, has fewer available spaces for customer parking, and has a smaller area for the display of produce, and produce in the drive through shed must either be displayed on the ground or left in the growers' trucks. The Defendants' Manager of the Columbus State Farmers Market conceded that the drive through shed is a less desirable location from which to sell produce than the elevated sheds.

5. The sales spaces in the elevated sheds are now assigned to Georgia farmers, and non-resident farmers are

assigned to the less desirable sales spaces in the drive through shed. The sole basis for the assignment of Alabama growers to spaces in the drive through shed is that they are non-residents of the State of Georgia.

6. Witnesses for the Defendants testified that the purpose for the method of assignment was to give preference to Georgia residents over residents of other states.

7. During the selling season of 1977, Plaintiff was asked for the first time to relocate his produce sales to the far east end of the southernmost elevated platform shed. During the selling season of 1978, Plaintiff was asked, and later ordered, to move his produce sales from the elevated shed to the drive through shed. Witnesses for the State of Georgia admitted that the reason for ordering Plaintiff to move was that he was a non-resident of the State of Georgia.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this cause of action.

2. Based upon a consideration of the evidence presented by the parties at the hearing for injunctive relief, it appears to the Court that Plaintiff will be irreparably damaged if the Court does not grant the injunctive relief sought.

3. The rule enforced by the Department of Agriculture of the State of Georgia whereby preferential space assignments at the State Farmers Market in Columbus, Georgia, are made to residents of the state of Georgia, constitutes a denial of equal protection of the laws of the State of Georgia as to residents of the State of Alabama,

in violation of the Equal Protection provisions of the United States Constitution.

4. The assignment of the more desirable sales spaces at the Georgia State Farmers Market in Columbus, Georgia, to residents of the State of Georgia for the purpose of giving those residents an economic advantage over farmers who are non-residents of the State of Georgia, constitutes an impermissable burden on Interstate Commerce in violation of the Commerce Clause of the United States Constitution.

This the 8 day of September, 1978.

/s/ J. ROBERT ELLIOTT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed at 11:55 A.M., Sept. 8, 1978, /s/ H. Okay Parker,
Deputy Clerk, U.S. District Court,
Middle District of Georgia]

J. L. SMITH, *Plaintiff,* VS. THE DEPARTMENT OF AGRICULTURE OF THE STATE OF GEORGIA, et al., *Defendants.*	CIVIL ACTION NO. 78-98-COL

JUDGMENT

On July 5, 1978, J. L. Smith, by and through his attorneys, filed his complaint in the above-stated case seeking a temporary restraining order, preliminary injunction, declaratory judgment, and permanent injunction. Following an evidentiary hearing held on July 11, 1978, and argument by counsel for all parties and submission of a written brief by counsel for Plaintiff, no brief having been submitted by counsel for Defendants, —

IT IT CONSIDERED, ORDERED AND ADJUDGED that the rule and regulation of the Commissioner of Agriculture of the State of Georgia whereby non-residents of the State of Georgia are relegated to the use of inferior retail locations within the Georgia State Farmers Market operated in Columbus, Georgia, solely because they are non-residents of the State of Georgia and the products they sell are produced outside the State of Georgia, is void in that it deprives the Plaintiff and other similarly situated of rights secured by the Equal Protection provisions of the United States Constitution and constitutes an impermissible burden on interstate

commerce in violation of the Commerce Clause of the Constitution; and

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the Defendants, and each of them, and all persons in active concert or participation with said Defendant be, and they hereby are, permanently enjoined from the enforcement of any rule, regulation or practice whereby Plaintiff and others similarly situated are relegated to the use of inferior retail locations within the Georgia State Farmers Market operated in Columbus, Georgia, solely because they are non-residents of the State of Georgia and the products they sell are produced outside the State of Georgia.

This the 8 day of September, 1978.

/s/ J. ROBERT ELLIOTT

UNITED STATES DISTRICT JUDGE

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No. 80-1670

IN THE

Supreme Court of the United States

October Term, 1980

DEPARTMENT OF AGRICULTURE OF THE STATE OF GEORGIA, et. al.,
Petitioner,

v.

J. L. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the Court of Appeals for the Fifth Circuit in conflict with the decisions of the United States Supreme Court in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, ___U.S.___, 100 S. Ct. 271 (1980)?

2. Does the rule of the Department of Agriculture of the State of Georgia, giving priority assignments of Farmers' Market space to Georgia residents and declaring that less desirable spaces shall be assigned to nonresidents of the State of Georgia, impose an impermissible burden on Interstate Commerce in violation of Section 8 of the Constitution of the United States?

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STATEMENT OF THE CASE

Since Respondent is unable to agree entirely with the statement of the case set forth in the Petition for Writ of Certiorari, Respondent respectfully submits his own statement of the case. For ease of identification Respondent shall adopt the same references to parties as used by the Petitioners, as follows: Respondent J. L. Smith will be referred to as "Smith"; the State Farmers' Market in Columbus, Georgia, will be referred to as "Columbus Farmers' Market"; and the Petitioner Department of Agriculture of the State of Georgia will be referred to as "Department."

Respondent Smith is a farmer who lives and farms in Alabama. His sole source of livelihood is the growing and selling of farm produce, primarily consisting of vegetables indigenous to this area of the South, such as butter beans, peas, okra, corn, and tomatoes.

For twenty years Smith has sold his vegetables at the Columbus Farmers' Market, which is a market area owned and operated by the State of Georgia at which produce is offered for sale to the public. Individuals seeking to sell their produce at the Columbus Farmers' Market obtain a license from the Department allowing them to do so.

The portion of the Columbus Farmers' Market available for use by individuals for the sale of produce consists of three shed areas. Two of the areas are described as "elevated sheds" with the third area being described as a "drive-through shed", or locally known as the "watermelon shed." While the Petitioners describe the differences between the elevated shed and the drive-through shed as slight, the differences are numerous and are much more onerous than slight. The differences include the absence of an elevated platform for the display of produce in the drive-through shed, requiring the Alabama farmer who has been assigned to that space to display his produce either on the back of his truck or on the asphalt pavement. The drive-through shed lacks water either for drinking or keeping vegetables damp and cool, while the elevated shed has such water facilities. The drive-through shed has less accessible parking space for customers, less shaded area within which the vegetables remaining on the farmer's truck can be protected from sun and rain, and is generally, in every respect, a less desirable sales location. The local manager of the Columbus Farmers' Market himself testified that the elevated sheds were more desirable sales spaces, and Petitioners admit that the purpose and rationale of the rule or regulation of the Department is to afford a preference to Georgia residents.

Smith has sold his produce at the Columbus Farmers' Market for more than twenty years. Until 1978, he had been assigned space at the Columbus

Farmers' Market on a "first come - first served" basis. Beginning in he was informed by the Petitioners that space would be assigned on a basis giving preference to Georgia residents, so that nonresidents of the State of Georgia would be relegated to the drive-through shed if there was not enough space under the elevated shed to accommodate Georgia farmers. That is, if the number of Georgia farmers desiring to sell produce was equal to or greater than the number of spaces available under the elevated sheds, then all of the elevated shed space would be assigned to Georgia farmers, and nonresident farmers (meaning Alabama farmers) would be assigned to space in the drive-through shed.

During the summer of 1978, Smith was ordered by the Department and the local manager to move from the elevated shed where he had previously been assigned, and to locate his truck and produce in the drive-through shed. The admitted and avowed purpose of requiring Smith to move was that he was an Alabama resident, and the elevated shed space was to be reserved, when needed, for Georgia residents. Smith refused to move, was threatened with suspension or revocation of his license, and, in fact, was given notice of a hearing at which the Department would seek to revoke his license.

Smith filed suit in the United States District Court for the Middle District of Georgia, Columbus Division, asserting as grounds for his suit that the rule of the Department violated the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment of the Constitution of the United States.

Following an evidentiary hearing at which testimony was received from Petitioner Williams (Manager of the Columbus Farmers' Market), from

Emory Brinson, Assistant Commissioner for Marketing, Georgia Department of Agriculture, and from Respondent Smith, the District Judge reached certain findings of fact and conclusions of law, attached to the Petition for Writ of Certiorari as Appendix B, and made a part hereof by reference. The findings of fact of the trial court, unchallenged by Petitioners, demonstrate the advantages of the elevated shed over the drive-through shed, and further demonstrate the discriminatory rationale and basis for the regulation; to-wit, the rule intends to discriminate against nonresidents of the State of Georgia because they are nonresidents.

The District Court issued a permanent injunction, enjoining and preventing the State of Georgia and the Department from enforcing its discriminatory regulation. The Department appealed to the United States Court of Appeals for the Fifth Circuit, wherein the decision was affirmed. The Department's Petition for Rehearing and Suggestion for Rehearing En Banc was filed and denied, and Petitioners now seek a Writ of Certiorari to review the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

I. By constructing farm produce sales locations, the State of Georgia has not "entered the market place," thus become a market participant; rather, it continues to act in the governmental role of a "market regulator." While it is true that, under the authority of the cases cited by Petitioners, a state or other governmental entity acting as a "market participant" may not under certain circumstances be subject to scrutiny under the Commerce Clause, that rule of law is simply inapplicable in the case at bar. There is no economic market for the sale of farmer's market space. Rather, in its governmental capacity, the State of Georgia has simply elected to provide a governmental service, comparable to the provision of any other government service such as fire protection, police protection, or road construction. By enacting rules for its farmer's market which distinguished between the citizens of Georgia and non-residents of Georgia in the assignment of space, the State has run afoul of the Commerce Clause of the United States Constitution.

II. It has been clearly established as a principle of constitutional law that state action or legislation, the goal of which is "economic protectionism," is impermissable under the Commerce Clause. That being the sole and avowed purpose of the rule here under attack, the rule is a *per se* violation of the Commerce Clause.

ARGUMENT AND CITATION OF AUTHORITY

I. The actions of the State of Georgia and the Department of Agriculture are subject to scrutiny and control under the Commerce Clause of the United States Constitution. The decision of the Fifth Circuit is neither controlled by nor in conflict with the Supreme Court decision in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, __U.S.__, 100 S. Ct. 271 (1980).

The Petitioners have stated, without supporting evidence of findings of fact by the District Court, the bold and erroneous conclusion that the State of Georgia has "entered the economic market of the construction of farm produce sales locations". It is upon this unsupported conclusion that the Petitioners predicate their argument that the regulation of the State of Georgia granting preference to Georgia farmers over Alabama farmers is not the kind of activity with which the Commerce Clause is or ought to be concerned.

If the State of Georgia has "entered the market place" by building a farm produce sales location, it has entered that market place alone. There is no evidence in the record, and there can be no evidence, that there are other persons or entities in the business of providing space for the sale of farm produce by farmers. The Columbus Farmers' Market is the only place in West Central Georgia or East Alabama at which a farmer who plants and

produces his own crops can bring those crops and offer them to the public for sale. In an attempt to avoid the requirements of the Commerce Clause, and in an attempt to squeeze itself within the narrow perameters of the *Hughes* decision, *supra*, Petitioners would lead the Court to believe that the States of Georgia and Alabama are flooded with produce markets, each of which is competing furiously for farmers to occupy its space. These fictitious markets no doubt advertise, engage in price wars, lure farmers back and forth between markets through the use of discount prices, increased services, etc. An argument based upon the existence of such fictitious markets is not merely without merit; it is absurd.

The argument made by Petitioners, carried to its logical conclusion, would require us to conclude that the State of Georgia has also entered the economic market for highways, in competition with other equally fictitious private highway owners. Thus, when automobiles from the State of Alabama wish to ride on State owned roads, the State of Georgia can offer a preference in crowded times to Georgia residents, and if the Alabama residents do not like the preference, they can simply take their vehicular business to the private road owners who compete so vigorously with the State of Georgia for vehicular traffic.

It is an abstractly correct principle of law that, when a governmental entity such as the State of Georgia does enter the marketplace as a competitor, then it has the same rights as any other competitor as to choosing those with whom it will deal. Nevertheless, as stated above, there is no such "entry into the marketplace" by the State of Georgia as a competitor, and the rationale of the cases cited by Petitioners is therefore not applicable in this case. It is of interest to note that the "entering the marketplace" argument, now relied

upon so heavily by the Petitioners, was not raised or dealt with at the trial court level. The first mention in the record of that argument was made by the Court of Appeals for the Fifth Circuit, dissenting opinion of Judge Randall. Petitioners quickly latched onto this rationale as a last resort, but failed completely to raise the issue in the trial court.

Petitioners seek refuge in the holdings of *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, ___U.S.___, 100 S. Ct. 2271, 65 L. Ed. 2d___ (1980). Respondent respectfully submits that neither of these cases is authority for overturning the decision of the Court of Appeals in the case *sub judice*. Those cases suggest that the applicability of the Commerce Clause to "state action" may be different in cases where the State has become a market participant, as distinguished from those cases where the State acts in its traditional role as "market regulator." While this is an abstractly correct principle of law as announced by this Court, that principle has no relationship or bearing on the case now before this Court.

In *Alexandria Scrap, supra*, the State of Maryland had enacted legislation whereby it would purchase every Maryland-titled junk car hulk which had been converted into scrap. The legislation distinguished between in-state sellers of scrap hulks, and those who resided outside the State of Maryland. A more difficult bookkeeping process was prescribed for the out of state sellers of junk automobiles.

In upholding the Maryland law, this Court stated that, when a State itself enters the marketplace, becomes a participant and a competitor in the sale or purchase of goods or commodities, then the State has the same rights and duties as any other market participant. Thus, the State can purchase from whomever it pleases, and may sell to whomever it pleases; and, if the State chooses not to deal with

persons or entities from outside its own borders, it may do so free of restraint from the Commerce Clause.

In *Alexandria Scrap, supra,* there can be no question that the State of Maryland had entered the marketplace for the purchase of hulk automobiles. The automobiles were not previously owned by the State of Maryland, they were not under the control of that governing body, and people who did own or control these junk hulks could bring them to the State, show the proper documentation, and receive money for them. This was clearly the purchase by the State of Maryland of junk automobiles. How does the factual situation of the case at bar compare with the *Alexandria Scrap* factual situation? Respondent respectfully submits that there is no similarity between the tow cases, and respectfully suggests that the cases simply have nothing to do with one another. In the case at bar, the State of Georgia ownes real estate on which it has established a farmers' market. The State is not buying or selling anything; in its governmental capacity, it is simply making available a marketplace for those who wish to buy and sell produce. Thus, the position of the State of Georgia that it has "entered the marketplace" by selling market space is untenable and unsupported by either fact or law. This conclusion is not altered by the fact that the State exacts a license fee from farmers selling produce at the Columbus Farmers' Market. In numerous Commerce Clause cases, a license fee was required of both residents and nonresidents; yet the requirements of the Comerce Clause have nevertheless been held to be applicable.

The other case upon which Petitioners rely, *Reeves, Inc. v. Stake,* ___U.S.___, 100 S. Ct. 2271, 65 L. Ed. 2d___(1980), is likewise inapplicable to the facts of this case. There, the State of South Dakota was selling cement produced at a State-owned plant. In times of shortage, the State chose to sell its cement

only to residents of the State of South Dakota. It is again clear in *Reeves, Inc., supra*, that South Dakota had entered the marketplace as a participant and as a competitor, and under long established principles could buy or sell to or from whomever it chose.

Respondent submits that the better authority upon which this case should be decided is a case not cited by the Petitioners, but is a case which much more closely resembles the case at bar with regard to both the law and facts involved. In *City of Philadelphia v. State of New Jersey*, 437 U.S. 617 (1978), this Court declared to be unconstitutional a New Jersey statute which prohibited out of state garbage from being deposited in New Jersey landfills under the pretense of preserving its diminishing landfills for New Jersey garbage. Because the regulation was aimed only at out of state garbage, the Supreme Court found it to violate the principle of non-discrimination inherent in the Commerce Clause, and discussed so frequently in Commerce Clause cases.

In holding the New Jersey statute unconstitutional, this Court applied the same approach which we have urged throughout the course of this case, to-wit: a virtual *per se* rule of invalidity where the sole purpose of the state statute, rule, or action is "economic protectionism" for its citizens. With the Court's indulgence, we shall quote from the *City of Philadelphia* case, *supra*, at some length.

> "The opinions of the Court through the years have reflected an alertness to the evils of economic isolation and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is

effected by State Legislation, a virtually *per se* rule of invalidity has been erected. See, e.g., *H. P. Hood & Sons, Inc. v. Du Mond, supra, Toomer v. Witsell,* 334 U.S. 385, 403-406, 92 L. Ed. 1460, 68 S. Ct. 1156; *Baldwin v. G. A. F. Seelig, Inc., supra; Buck v. Kukendall,* 267 U.S. 307, 315-316, 69 L. Ed. 623, 45 S. Ct. 324, 38 ALR 286. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's border. *Cf. Welton v. Missouri,* 91. U.S. 275, 23 L. Ed. 347. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844.

> 'Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interestate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits .... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. See also *Raymond Motor Transportation, Inc. v. Rice, supra,* at 441-442, 54 L. Ed. 2d 664, 98 S. Ct. 787; *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 352-254, 53 L. Ed. 2d 383, 97 S. Ct. 2434; *Great A & P Tea Co.*

> *v. Cottrell*, 424 U.S. 366, 371-372, 47 L. Ed. 2d 96 S. Ct. 923.'
>
> "The crucial inquiry, therefore, must be directed to determining whether ch 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531.

Upon examination of its purposes, this Court struck down the New Jersey regulation in language which squarely fits the case at bar.

> "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct. But the difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionism reasons." *City of Philadelphia v. State of New Jersey*, 57 L. Ed. 2d 475 at 484.

Respondent respectfully submits that there can be no serious question that the rule in issue in the case at bar is a protectionist measure imposed by the State of Georgia to grant a preference to its citizens in the conduct of commerce, over the citizens of other states. That being the case, it is a *per se* violation of the Commerce Clause, and should be struck down. The argument of the State, to the effect that it has

simply entered the marketplace, is wholly without merit or support.

II. Does the rule of the State of Georgia and of the Department violate the Commerce Clause of the United States Constitution?

The Respondent accepts as accurate the three pronged analysis suggested by the Petitioners, the source of which anaylsis is *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See also, *City of Philadelphia v. State of New Jersey*, *supra*, and *Pike v. Bruce Church, Inc.*, *supra*. According to the Hughes analysis, the challenged statute or regulation must first regulate evenhandedly with only incidental effects on interstate commerce; it must also serve a legitimate local purpose; and, if these two prerequisites are met, it must then be determined whether a less discriminatory alternative might be available to promote the same local purpose.

Petitioners have, without support in law or fact, boldly concluded that the first two prerequisites of the *Hughes* analysis are met. This is, Petitioners have suggested that the rule does "regulate evenhandedly", and that it serves a legitimate local purpose. Respondent respectfully submits that neither the first nor the second nor the third prong of the *Hughes* test can be met by the rule in question.

Does the challenged rule "regulate evenhandedly"? On its face, it does not. Alabama farmers are required to use one area of the farmers' market, while Georgia farmers are allowed to use another area. Such a regulation which discriminates solely on the basis of State residency cannot be said to be evenhanded.

For an example of "evenhandedness", see *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 82 L. Ed., 734 (1937). There, the State of South Carolina had enacted legislation which prohibited the use on state highways of motor trucks and semi-trailer trucks

exceeding 90 inches in width and 20,000 pounds in weight. This Court upheld the validity of the statute, and emphasized the non-discriminatory nature of the law. It applied to residents of South Carolina and to nonresidents alike. The State of South Carolina did not, in that case, attempt to allow its own residents, in order to promote local industry, to carry larger or heavier loads upon the state highways, simply because they had paid for the construction of those highways. On the contrary, all truckers, residents and nonresidents alike, were required to obey the same regulation. In the case at bar, the contrary is true. One rule applies to residents, and another to nonresidents.

Thus, the rule involved here fails to meet the first test of the *Hughes* case, *supra;* the rule does not regulate "evenhandedly". On its face, it is discriminatory.

Does the regulation in suit foster a legitimate state or local interest? It is beyond peradventure that it does not. If there is any theme which consistently runs through the so-called milk cases, i.e., *Hood v. DuMond*, 336 U.S. 525 (1949); *Baldwin v. Seelig*, 294 U.S. 511 (1934); *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1950); and *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), that theme is this: a regulation or statute that has as its purpose the granting of an advantage to the residents of Georgia over the residents of another state in the sale of produce or the conduct of commerce is, *per se*, invalid. It is precisely the purpose of the regulation in suit i.e., granting an economic advantage to local producers, which has been consistently declared to be invalid by this Court.

The regulatory scheme in the case at bar is a remarkable one in this regard; in every other case which our research has revealed, the State has at least attempted to camoulflouge its attempt to protect and foster its own local commerce at the

expense of commerce from other states as a health, safety or moral measure. Even in those cases, however, the courts have not observed lables or form, but have looked with very strict scrutiny at the substance of the regulations. Yet when the State gives as its only and avowed purpose the discrimination against interstate goods, and the protection of intrastate commerce, that regulation is *per se* unconstitutional.

In *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1950), this Court stated:

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, *save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.* (citation omitted) Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interest and the available method of protecting them. (citation omitted)" (emphasis added)

In the case at bar, the State of Georgia "artlessly discloses an avowed purpose to discriminate against interstate goods." By so doing, the State relieves this Court of the necessity of balancing the local interest sought to be protected against the interest of interstate commerce. Since the avowed purpose of the regulation is to discriminate, the court's inquiry need go no further. It is *per se* unconstitutional.

Thus, the regulation here sought to be upheld by the State of Georgia neither regulates evenhandedly, nor does it foster a legitimate local purpose. Yet assuming *arguendo* that prongs numbered 1 and 2 of the *Hughes* rationale were met, can it be said that no less discriminatory alternative is available to foster the local pupose?

The "local purpose" suggested by the Petitioners before this Honorable Court is the purpose of allocating a finite resource (sales space) in a fair and reasonable manner. It is interesting to note that in the Petitioners' brief in the Fifth Circuit Court of Appeals, the State gave as its pupose the promotion of in-state industry. "Therefore, the burden placed upon interstate commerce *to promote an in-state industry . . . foste s a legitimate state interest . . .*" Defendants' brief at p. 19 (emphasis added).

In any event, if the purpose of the regulation is to allocate in a fair and rational and reasonable manner a finite resource, certainly there are other less discriminatory alternatives available. For example, the space could be allocated by means of a lottery, with no distinction made on the basis of state residency. Or, space could be allocated on a time basis, again with no discrimination or distinction made based upon state residency. Thus, if space was unavailable, and any farmer (Georgia or Alabama) had been in the preferable sales location for a period of eight days (for example), he could be required to move to the less desirable location for a period of eight days, and then be allowed to return to the elevated shed area.

Respondent does not pretend to suggest all of the non-discriminatory alternatives available to the State of Georgia if its real intent is to allocate a finite resource. On the other hand, Respondent respectfully submits that the State has chosen not the least discriminatory alternative, but the most discriminatory alternative. What method of allocating space could be more discriminatory against interstate commerce than a scheme which has as its sole determining factor the state of residence of the farmer, and which *always* grants the preferable sales location to Georgia farmers?

Respondent respectfully submits that the

challenged regulation is neither evenhanded nor legitimate, nor the least discriminatory alternative. For these reasons, Respondent submits that the decision of the Fifth Circuit Court of Appeals should be upheld and that the Petition for Writ of Certiorari should be denied.

CONCLUSION

The issues raised in the Department's Petition for Writ of Certiorari have long been settled in favor of the Respondent. It is beyond reasonable question that a state may not enact any rule or regulation, or adopt any custom or procedure, which has as its purpose and effect the protection of an in-state industry at the expense of nonresident competitors. To adopt the position asserted by Petitioners would be to erase more than fifty years of Commerce Clause precedent from the pages of this Court's decisions. Respondent respectfully submits that the issue raised is a matter of well established Constitutional law, and that the decision of the Fifth Circuit Court of Appeals is imminently correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served Petitioner with three copies of the foregoing brief in opposition to the Petition for Writ of Certiorari by mailing a copy of same, postage prepaid and properly addressed, to Carl C. Jones, 132 State Judicial Building, Atlanta, Georgia 30334.

This 15th day of May, 1981.

Jerry A. Buchanan